Neutral Citation Number: **[2020] EWHC 1164 (Comm)**

CL-2009-000382

Case No: CL-2009-000382

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT
QUEEN'S BENCH DIVISION

Royal Courts of Justice,
Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 12 May 2020

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

Russian Commercial Bank (Cyprus) Limited	**Claimant**
- and –	
Fedor Khoroshilov	**Defendant**

- -
- -

Mr Iain Pester (instructed by **SCA Ontier LLP**) for the **Claimant**
Dr Anton van Dellen (instructed by **Direct Access**) for the **Defendant**

Hearing dates: 6 May 2020
Draft Judgment sent to parties: 7 May 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Tuesday 12 May 2020 at 10:30am.

Mrs Justice Cockerill:

Introduction

1. This judgment is given in respect of two applications made by the Defendant, Mr Khoroshilov, a Russian businessman:

    i) An application, issued 25 July 2019 ("the First Application"), to set aside paragraph 2 of the Order of Teare J of 7 May 2013, dispensing with the requirement of personal service on Mr Khoroshilov pursuant to CPR Part 81, r. 81.10(5) ("the Service Order"). Mr Khoroshilov says that the method of service under the Hague Convention should have been used.

    ii) An application, issued 5 August 2019 ("the Second Application"), to set aside the Order of HHJ Mackie QC sitting as a Judge of the High Court dated 1 October 2013 ("the Committal Order"). Pursuant to the Committal Order, Mr Khoroshilov was held to be in contempt of Court, by reason of his having transferred the yacht "Giant 1" in breach of the express provisions of the worldwide freezing order dated 9 October 2009 ("the WFO"). Mr Khoroshilov says that the sale of Giant 1 did not merit a finding of contempt.

2. The applications are described by the Respondent RCB as extraordinary. They are certainly unusual. They relate to proceedings for and a finding of contempt over six years ago. The basis for the application at this very late stage is that Mr Khoroshilov's case is that he did not attend the earlier hearings on 7 May 2013 and 1 October 2013, because he was unaware of the Bank's attempt to commit him, and that he has an express permission to apply pursuant to paragraph 3 of the Committal Order which provides that *"… [Mr Khoroshilov] has liberty to apply to set aside or vary this Order within 14 (fourteen) days of it coming to his attention"*.

The position on the evidence

3. The applications were made in July and August 2019. No evidence was served with them. The time limit for filing evidence in reply was a month later. No evidence was served then. The hearing was listed in October 2019.

4. On 30 April, after bundles had been put together containing evidence from the past applications in this matter, the Claimant served a fourth witness statement of Mr Booker ("Booker 4"). That statement was said to be in opposition to the applications. It dealt with the debt, Mr Khoroshilov's arrest and imprisonment, his presence in Moscow – and brought to the attention of the court an affidavit of 30 September 2013 which dealt with the question of whether the committal application had come to Mr Khoroshilov's attention.

5. Overnight the night before the hearing Mr Khoroshilov then produced a witness statement supposedly in response to Booker 4. Certainly it takes issue with whether any part of the judgment debt has been paid. It also deals with the circumstances of Mr Khoroshilov's arrest and his location prior to that. It also takes issue with some of the articles in exhibits to earlier statements.

6. I have indicated to the parties that I regarded both these statements as coming way too late, and as also being irrelevant to the issues before me, although I have taken notice of the admissions against the Bank's case in the earlier affidavit of Mr Booker, which was a document which had previously been deployed in these proceedings. The hearing thus proceeded by reference only to the Application Notices and the historic documents.

Background

The Worldwide Freezing Order

7. On 9 October 2009, the Bank obtained the WFO from Gross J, at a hearing at which Mr Khoroshilov was represented. Pursuant to paragraph 2 of the WFO, Mr Khoroshilov was enjoined from disposing, dealing with or diminishing his assets up to the value of US$245,493,499.62.

8. Paragraph 3 specifies that paragraph 2 applies to all Mr Khoroshilov's assets, whether or not they are in his own name, and whether they are solely or jointly owned. Paragraph 3 also includes the wording.

> "For the purpose of this order the Defendant's assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. The Defendant is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions."

9. In response to the Freezing Order, Mr Khoroshilov provided an affidavit on 23 October 2009, in which he named a yacht, "Giant 1" and explained that it was owned by a BVI company, Verber Holding Limited ("Verber"). Giant 1 was declared as having experienced a fire three years prior to the affidavit, causing significant damage and requiring substantial repair and refurbishment estimating to cost $19million. A mortgage in favour of Privatbank IHAG Zurich AG in the sum of $19.8 million was also declared and the current value was stated as negligible without substantial repair and investment.

10. While the sole director and shareholder of Verber is said to be a Mr Agapios Agapiou, it is apparent that Mr Khoroshilov considered Giant 1 to be his asset, not only because he provided details as to its value in his disclosure affidavit, but also because he explains that, while

Giant 1 is held in trust, "*the trustees habitually deal with [the Yacht Giant 1] according to the instructions of the Respondent*", that is, Mr Khoroshilov

11. The reason this asset was covered is because pursuant to paragraph. 14.6, the definition of "assets" under the WFO expressly includes;

> "any property held in discretionary trust which the trustees habitually deal with according to the instructions of the Defendant …".

The Consent Order

12. On 2 August 2010, a Consent Order was made by David Steel J, whereby at paragraph 1 judgment was entered against Mr Khoroshilov for US$291,360,264.11. Pursuant to paragraph 5 of the Consent Order, the WFO continued, until satisfaction of the judgment in the proceedings. Pursuant to paragraph 7, there was a stay on enforcement of the judgment until 2 May 2011.

13. On 27 April 2011 (the last working prior to the expiry of the stay on enforcement under the Consent Order), Mr Khoroshilov applied without notice to have the Consent Order set aside, and for an injunction restraining the enforcement of the Consent Order, on the basis that the Consent Order had been obtained by fraudulent misrepresentations. Nicola Davies J granted the injunction sought.

14. Following a two day hearing (14 and 15 June 2011) before Blair J, by order dated 5 July 2011, Blair J discharged the injunction obtained by Mr Khoroshilov, gave directions for the trial of Mr Khoroshilov's application to set aside the Consent Order, and awarded the Bank the costs of the hearings before Nicola Davies J and himself. Blair J discharged the injunction obtained by Mr Khoroshilov on the balance of convenience and also because of non-disclosure at the without notice hearing on 27 April 2011, as is apparent from [81] of the judgment.

15. On 8 August 2011, the Bank sought an unless order to the effect that unless Mr Khoroshilov and his companies paid certain outstanding sums due to it, then Mr Khoroshilov's applications and Particulars of Claim dated 27 April 2011 should be struck out. On 5 September 2011, Eder J granted the Bank the unless order relief sought by the Bank.

16. By 9 September 2011, Mr Khoroshilov failed to comply with the obligations under the unless order, with the consequence that his claim was struck out and that the Bank was entitled to enforce the Consent Order. In other words the full sum of US$291,360,264.11 became payable.

The Sale of Giant 1

17. On 12 October 2011, Verber sold Giant 1 to a Panamanian company, Phoenixrise SA, for US$1. There remained a mortgage of US$19.8 million on the vessel. The Bank did not learn of the sale until June 2012, when it was given a report by a firm of investigators, GPW & Co Ltd ("GPW"), which indicated that Giant 1 was shown as being owned by Phoenixrise SA.

The Committal Application

18. The committal application was issued on 23 October 2012. It was brought in respect of the Giant 1 disposal.

19. At that time, the Bank did not know the whereabouts of Mr Khoroshilov, although it was believed that he was currently resident in Thailand.

20. Faced with the uncertainty as to Mr Khoroshilov's location, and mindful that the general rule is that a committal application should be served personally on a respondent (unless the Court orders otherwise: CPR 81.10(5)), the Bank applied by application dated 5 November 2012 for an order for alternative service. This application was heard by Popplewell J on 7 December 2012. Popplewell J adjourned the application, with liberty to restore, on the ground that he wished to have further evidence as to Mr Khoroshilov's current whereabouts.

21. At the time, in December 2012, Mr Khoroshilov's solicitors Field Fisher Waterhouse ("FFW") were still on the record. They were notified of the committal application and the application for alternative service. FFW indicated by email that no one for the Defendant would attend the hearing on 7 December 2012.

22. The application for alternative service, supported by additional evidence, was relisted before Teare J on 3 May 2013. Teare J acceded to the application to permit service, by three different methods, namely, on Mr Khoroshilov's solicitors, FFW, in London, on Mr Khoroshilov's wife, in Russia, and at the P.O. box which the Bank had some ground to believe was being used by Mr Khoroshilov in Thailand.

23. The documents directed to Mrs Khoroshilova were returned, apparently having remained uncollected. There was no reaction to the service on FFW, although they indicated by letter that they had not had contact with Mr Khoroshilov for some time. I have no information about the attempt to serve in Thailand.

24. The Bank's committal application was heard on 6 September 2013. HHJ Mackie QC held that, notwithstanding the criminal standard of proof to be applied, it was appropriate to make a finding that Mr Khoroshilov was in contempt by reason of the transfer of the yacht "Giant 1". HHJ Mackie QC was satisfied (as Teare J had been satisfied when giving the Bank permission to serve by alternative means in

May 2013) that the Bank had taken all reasonable steps to serve the committal application and supporting evidence on Mr Khoroshilov.

25. The Bank re-applied to HHJ Mackie QC on 1 October 2013 to explain that it had come to the attention of the Bank's solicitors that FFW had in fact indicated in June 2013 that, although they had not applied to come off the record, they were no longer in communication with Mr Khoroshilov. HHJ Mackie QC was satisfied that it was nevertheless appropriate to make a finding of contempt. Permission was also given to the Bank to amend its application to provide further details of the contempt of court.

26. FFW then applied to come off the record and did so in late October 2013.

27. At a further hearing as to sentence on 20 December 2013, Cooke J gave judgment, holding that the appropriate sentence was one of imprisonment of 18 months.

28. Meanwhile on 13 November 2013, Mr Khoroshilov was arrested in Russia and subsequently sentenced to a lengthy prison sentence in Russia. Mr Khoroshilov spent a number of years in prison in Russia. It is his case that, following his release, he gained electronic access to the court file, and first had sight of the Order of Teare J on 27 June 2019.

29. He applied to have it set aside or varied on 23 July 2019. On 25h July 2019, he says that the Order of HHJ Mackie QC of 1 October 2013 was translated for him and he applied for it to be set aside or varied on 4 August 2019.

The issues

30. Mr Khoroshilov in his written submissions assumes that the matter is as simple as dealing with the two issues: service and existence of equity in Giant 1. However the Bank takes issue with this approach, and submits that Mr Khoroshilov has first to prove that he is entitled to do so.

31. The Second Application specifies that Mr Khoroshilov applies under CPR r. 39.3 for the declaration that he was in contempt to be set aside and there to be a re-hearing and / or applies under paragraph 3 of the Committal Order by which Mr Khoroshilov was given permission to apply to set aside or vary the order within fourteen days of it "*coming to his attention*".

32. It is submitted for the Bank, and I accept, that CPR r. 39.3 is not the correct rule, as it is directed at a failure to attend the trial. It is submitted that the correct provision of the CPR is in the circumstances CPR r. 23.11(2). this provides that:

> "Where –
>
> a) The applicant or any respondent fails to attend the hearing of an application; and
> b) The court makes an order at the hearing,
>
> The court may, on application or of its own initiative, re-list the application."

33. However, I am not persuaded that there is a significant difference based on which rule one assumes to be correct. This is because it appears that the test is the same.

34. The Claimant relies on *Ivanhoe Mines Ltd v Gardner* [2019] EWHC 3142 (Comm). In that case, the defendant applied in July 2019 to set aside an Order made to enforce a Tomlin Order which the Claimant had obtained in November 2018. The Order enforcing the Tomlin Order had been made in the Defendant's absence in long-running litigation where the Defendant had instructed his solicitors that he did not wish to be contacted by them anymore with regards to the litigation and had not left the claimant with any means of contacting him.

35. Teare J indicated at [21] that on an application pursuant to CPR Part 23, r. 23.11 the Court should consider at least the following questions:

    i. whether the applicant acted promptly when he learnt of the order made against him;

    ii. whether he had a good reason for not attending the hearing and

    iii. whether he has a reasonable prospect of overturning the order which he sought to set aside.

36. Those are the principles which the Defendant says are applicable here and which it has addressed in its skeleton and before me. Those principles are effectively identical to CPR 39.3(5), which provides:

> "Where an application is made under paragraph (2) or (3) by a party who failed to attend the trial, the court may grant the application only if the applicant –
>
> (a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him;
>
> (b) had a good reason for not attending the trial; and

> (c) has a reasonable prospect of success at the trial."

37. I therefore consider these questions in turn.

Did Mr Khoroshilov act promptly when he learnt of the order made against him?

38. Pursuant to paragraph 3 of the Committal Order Mr Khoroshilov was given permission to apply to set aside or vary the order within fourteen days of it "*coming to his attention*".

39. The application states that Mr Khoroshilov only became aware of the "contents" of the Committal Order on 27 June 2019. On his case, he learned of the orders which he seeks to set aside or vary when he was "*granted electronic access to the case*" on that date. Given that he was granted access to the file on 27 June 2019, any application to set aside the Committal Order under paragraph 3 of the Order should have been brought within 14 days, that is, by 11 July 2019 at the latest.

40. Any application not based on this Order had to be brought promptly – and it was submitted for the Bank that 14 days gives a very strong pointer. Even if an application under CPR 23.11 or CPR 39.3 is not thus limited to an application made within 14 days the Bank only submitted that 14 days would be sufficient to meet the requirement of promptitude.

41. Although it is true, as Dr Van Dellen submitted, that promptly does not necessarily import such a confined period as 14 days (authorities in relation to default judgments have stretched the period to 59 days or more in certain circumstances), I would be minded to accept the submission that in context 14 days should be seen as defining promptly in this context - at least on a *prima facie* basis - such that there would need to be good reason for taking a longer time.

42. As Mr Khoroshilov's first application (challenging the Service Order) was issued on 24 July 2019, and his second and main application, directed at the setting aside or variation of the Committal Order, was not issued until 4/5 August 2019 (the difference being the dates on which the application was made/stamped) it would follow that unless there was some good reason for a longer period being allowed he had not acted promptly.

43. Mr Khoroshilov seeks to explain the delay by suggesting that the Committal Order was not translated into Russian for him until 25 July 2019. However:

i) That is not what he has said elsewhere; the second page of the Second Application states that Mr Khoroshilov first became aware of the contents of the Committal Order on 27 June 2019 (which ties Mr Khoroshilov's awareness into the date when Mr Khoroshilov was granted electronic access to the case on 27 June 2019),

ii) It seems unlikely that it would take four weeks to translate a four page order into Russian. The only source for this assertion is the application notice signed by counsel. Mr Khoroshilov has not filed any witness statement, properly verified by a statement of truth, let alone an affidavit.

iii) There is no explanation for how, if this is the case, he was able to make the first application on 23 July 2019.

44. I would also add that as regards evidence generally Mr Khoroshilov has failed to adduce any proper evidence. While it is of course the case that a party can elect not to produce affidavit evidence and may instead rely on the contents of an application notice, in order for the application notice to be accepted as evidence, it must be supported by a statement of truth.

45. A compliant statement of truth is set out in CPR 22 PD paragraph 2.1:

> "[I believe][the (claimant or as may be) believes] that the facts stated in this [name document being verified] are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth."

46. The key point is that someone must be prepared to put their name to what is said and expose themselves to the penalties for contempt of court if what is verified is not true.

47. The Application Notices in this case were only supported by a statement which said: *"The Claimant believe that the facts stated in this section are true. I am duly authorised by the Claimant to sign this statement.*" That is, self-evidently, not a compliant statement of truth. The result is that evidentially Mr Khoroshilov is confined to the evidence adduced by the Bank.

48. I also accept the submission that even if the contents of the Application Notice could be given some weight, this is an inadequate basis for Mr Khoroshilov to approach this matter. Mr Khoroshilov is effectively seeking an indulgence from the Court. As Teare J noted in the *Ivanhoe* case the court has limited resources. It has already expended considerable amounts of them on this case and the committal application in particular. It is incumbent on Mr Khoroshilov,

if he wishes to persuade the Court to set that Order aside, to properly address the relevant criteria on proper evidence whether by statement or properly verified Application Notice. He has failed to do so.

49. Having said that I am not necessarily persuaded that a lack of promptness must result in dismissal. And particularly in circumstances where the lack of promptness was not gross, I do therefore consider the other questions which are material to the question of reopening an application.

Did Mr Khoroshilov have a "good reason" for not attending the hearings before Teare J and HHJ Mackie QC?

50. Central to both Applications is the assertion by Mr Khoroshilov that he was unaware of the Bank's attempts to pursue committal proceedings against him. As I have noted above, that assertion rests on an inadequate evidential base, but I will consider its merits.

51. The Bank says that I should conclude that Mr Khoroshilov was aware of the application, or that he certainly cannot say that his failure to be aware of the application was owing to "good reason".

52. It points out that the Bank served the committal application and evidence in support, pursuant to the Service Order, by three different means:

    i) On Mr Khoroshilov's solicitors of record, FFW;

    ii) On Mr Khoroshilov's wife at her address in Tyumen, Russia;

    iii) At an address in Phuket Province, Thailand, discovered by private investigators employed by the Bank.

53. The Bank submits that it is highly likely that:

    i) Mr Khoroshilov's wife at least would have informed him that someone was trying to serve documents on him;

    ii) FFW would have passed the application on.

54. So far as Mrs Khoroshilova is concerned, there is a statement in the First Application that "*the applicant's wife was not in contact with him*". That is not supported by any proper evidence, even from Mr Khoroshilov. Certainly no corroborating evidence, such as a statement from Mr Khoroshilov's wife, has been provided.

55. Against the assertion that there was no contact, is the evidence of Ms Vitukhina that in late 2012 evidence was given to the Russian Court that Mrs Khoroshilova was in contact with Mr Khoroshilov. But at the same time there is evidence that the package of Committal

Application documents never made it beyond the local collection office, who returned them after they went uncollected.

56. I do therefore conclude, based on the Bank's evidence, that service was not effected on Mrs Khoroshilova. However the evidence also suggests that she was in contact with her husband, and that she would have been aware that someone was trying to serve documents on him. So that fact likely made its way to Mr Khoroshilov.

57. As for service on FFW, Mr Khoroshilov says (via the unverified Application Notice) that after the Consent Order they would not work for him without payment, which he could not make. The Bank notes that there is a tension between that statement and Mr Khoroshilov's case that he had ample assets to pay the sum due from him.

58. Certainly it appears that FFW were still on the record - the order approving their removal from the record is dated 21 October 2013. Although FFW said in late June 2013 that they had not had any contact for a "*significant period of time*" that does not mean that they were not able to pass information on to him in late 2012 when they were first informed of the committal application.

59. Further, FFW corresponded by email immediately before the first hearing of the committal application on 7 December 2012, indicating that no one would be attending on behalf of Mr Khoroshilov. While it did not refer to Mr Khoroshilov as their client and referred to their attendance and his as separate, there was no disavowal of a relationship with him; the email does not say that FFW have no instructions and are no longer in contact with Mr Khoroshilov.

60. I therefore conclude that FFW will be likely to have passed the application to their client - at least to the best of their ability. It is also noteworthy that the Order removing FFW from the record made provision for alternative service of the Order via Ms Gutarova and post to an address different to that which Mr Khoroshilov had previously used, which suggests that this was their means of communication with him.

61. The Bank has said that it "*reluctantly accepts that the Court may feel unable to decide whether or not the committal application did in fact come to Mr Khoroshilov's attention in 2012 – 2013*". That may be right, but at the same time I am not persuaded that it is appropriate for me to dodge this question entirely. Again it comes back to the evidence. This is a question which on the authorities is pertinent to the exercise Mr Khoroshilov asks me to perform. The burden is on him to satisfy the test of good reason, which involves him establishing that he did not know of the application earlier. In the absence of any proper evidence he does not do so. And indeed, based on the evidence, I should - if it had been necessary - have been prepared to

conclude that it is more likely than not that the application did come to Mr Khoroshilov's attention.

62. Further as the Bank points out, what Teare J decided in *Ivanhoe Mines v Gardner* at [30] (and the rule on which Mr Khoroshilov avowedly relies specifically says) is that the Court must ask itself whether Mr Khoroshilov had a "good" reason for not attending the hearing at which the order which he seeks to set aside was made. As that case demonstrates, the mere fact that a defendant does not know of an application does not by itself establish a "good" reason for a failure to attend a hearing. What Teare J said at [51] was:

> "Mr. Gardner has failed to show that there was a good reason for his not attending the hearing, though he did proceed promptly to set aside the court's order on learning of it. .... In circumstances where there is good reason to believe that Mr. Gardner did not wish to pay the tax he had agreed to pay and hoped (as proved to be the case) that Ivanhoe would have great difficulty in informing him of any steps they proposed to take to enforce his obligation to pay the tax in question his request that the court should re-list and re-hear the Tomlin Application is certainly unattractive and unappealing. Having regard to the court's limited resources a party who hopes to avoid a court order against him by making it difficult for his creditor to track him down cannot reasonably expect the court, after the court has allocated one hearing to the matter, to allocate another hearing to the matter at the behest of the party who finds that his attempt at avoiding a court order against him has failed...."

63. It is thus necessary for Mr Khoroshilov to establish a good reason. The Bank says that his position is analogous to that of Mr Gardner in the *Ivanhoe* case, that Mr Khoroshilov made a deliberate attempt to avoid receiving communications and to take no further part in the proceedings in an attempt to frustrate the litigation process.

64. Whether or not Mr Khoroshilov falls into the same category as Mr Gardner is questionable. However I am persuaded that whether or not the application came to his attention there is no good reason for his failure to make the application promptly. The essence of the point is that if Mr Khoroshilov was not actively evading the Bank, he was certainly not taking any steps to make himself contactable, and the evidence appears to demonstrate that he was keen not to be located fairly generally. It seems a reasonable inference that he was in hiding from the police and his creditors.

65. In this connection it is noteworthy that:

    i) He did not provide the Bank with any updated address where he could be contacted.

    ii) Mr Khoroshilov still does not say where his address in Moscow was at the relevant time.

    iii) In October 2012, when the Bank issued the committal application, there was a warrant out with Interpol for Mr Khoroshilov's arrest issued in connection with allegations of fraud related to loans made by Joint Stock Company VTB Bank ("VTB") in connection with the development of petroleum deposits in Russia.

    iv) There is no suggestion by way of evidence for Mr Khoroshilov that there were proper addresses for him. In the evidence at the time the Bank dealt with this, indicating that it knew of two addresses in Russia for Mr Khoroshilov:

        a) 22 Odesskaya Street, Apt. 96, Tyumen 625023, which is the registered address for Mr Khoroshilov in Russia; and

        b) 33 Republiki Street, Tyumen 625000, which is a business centre and which was provided in the guarantee agreement signed by Mr Khoroshilov (the address which Mr Khoroshilov now uses in these proceedings).

    v) The Bank's evidence is that it had not proved possible to serve Mr Khoroshilov at either of those addresses for at least two years prior to the issue of its committal application:

        a) It recounted how in the period since the arrest warrant had been issued in 2011 the Russian authorities had not been able to located Mr Khoroshilov;

        b) Four different attempts to serve documents from other proceedings at the identified addresses had already failed in the last two months.

        c) In the previous two years attempts to serve notices in relation to Russian Court proceedings at these addresses had also failed.

66. Accordingly, I am not persuaded that Mr Khoroshilov had good reason for not attending the hearing of the committal application. Given my conclusions thus far, the Second Application would almost certainly fail at this point. But I consider the third question for completeness.

Does Mr Khoroshilov have real prospects of successfully overturning the finding that he was in contempt of court?

67. Mr Khoroshilov submits that he does have good prospects of successfully overturning the finding of contempt and indeed urges me to do so.

68. Although in the Application Notice it had been suggested that it would be Mr Khoroshilov's case that:

    i) The sale of Giant 1 as commenced by a third party of out of his control and that the nominee was the legal personality acting and was not obliged to consult the Defendant.

    ii) Mr Khoroshilov had assets in excess of the maximum sum of US$245,493,499.62 as provided in the WFO;

    Dr Van Dellen wisely did not pursue these points in oral argument. The first was hopeless, and the second plainly not an available argument given the lack of evidence advanced by Mr Khoroshilov.

69. The gravamen of the argument advanced orally was instead that restrictively construing the freezing injunction, the Defendant has not disposed of an asset available to the Bank, as the mortgagee had $19.8million outstanding on Giant 1 and the Bank appears to accept that the value of the vessel was $12million. In the premises, it was said, no prejudice has been caused to the Bank at all.

70. The starting point on this argument is the position on the authorities that freezing orders of this kind are to be restrictively construed. He points to the judgment of Lord Clarke in *JSC BTA Bank v Ablyazov (No 10)* [2015] UKSC 64; [2015] 1 W.L.R. 4754 at [19]:

> "The third principle follows from the 'fundamental requirement of an injunction directed to an individual that it shall be certain': *Z Ltd v A-Z and AA-LL* [1982] QB 558 , 582, per Eveleigh LJ. It is that, because of the penal consequences of breaching a freezing order and the need of the defendant to know where he, she or it stands, such orders should be clear and unequivocal, and should be strictly construed: *Haddonstone Ltd v Sharp* [1996] FSR 767 , 773 and 775 (per Rose and Stuart-Smith LJJ); *Federal Bank of the Middle East Ltd v Hadkinson* [2000] 1 WLR 1695 , 1705C and 1713C-D (per Mummery and Nourse LJJ). In *Anglo Eastern Trust Ltd v Kermanshahgi* [2002] EWHC 1702 (Ch) Neuberger J stated: 'A freezing order, which has been referred to as a nuclear weapon, should … be construed strictly' because the court is 'concerned with an order which has a potentially draconian effect on the commercial and economic freedom of

> an individual against whom no substantive judgment has yet been granted'."

71. Other locations supporting this principle to which I have been referred by Dr Van Dellen for Mr Khoroshilov re:

    i) Lord Justice Beatson at [66] in the Court of Appeal judgment,

    ii) Lord Mustill, in *Mercedes Benz AG v Leiduck* [1996] AC 284, 297.

72. He also referred me to Lord Clarke at [20]:

> "What then of Beatson LJ's enforcement principle? As quoted in para 13 above, it is that the purpose of a freezing order is to stop the injuncted defendant from dissipating or disposing of property which could be the subject of enforcement if the claimant goes on to win the case it has brought, and not to give the claimant security for his claim. The principle has been put in much that way, not only by the courts below in this case but in many of the decided cases: see e g JSC BTA Bank v Solodchenko [2011] 1 WLR 888 , per Patten LJ, para 49(1) and Longmore LJ, para 52. Aikens LJ agreed with both. Thus Longmore LJ said that the purpose of a freezing injunction is to preserve a defendant's assets, subject to dealings in the ordinary course of business so that, if and when a judgment is pronounced, the defendant still has assets to meet that judgment. …"

73. Reference was also made to Mummery LJ in *Federal Bank of the Middle East v Hadkinson (Stay of Action)* [2000] 1 WLR 1695,1709:

> "In my judgment, the language of the freezing order, read in context and with regard to the object of the order, naturally refers to assets and funds belonging to the defendant and which are and should remain available to satisfy the claim against him. Assets and funds which belong, or, as in this case, are assumed to belong, beneficially to someone else would not be available for that purpose."

74. I was also referred to *Aspinalls Club Ltd v Lim* [2019] EWHC 2379 (QB) in support of the submission that committal proceedings should be proportionate and that committal is the court's ultimate weapon and should be used sparingly. On this basis it was argued that either the breach was minimal and hence committal proceedings were disproportionate and should be set aside or that the custodial

threshold has not been reached and a £25,000 fine is more appropriate (£10,000 for punishment and £15,000 for coercion).

75. On this point the Bank submitted that the argument was advanced on a misunderstanding and that the Bank had adduced uncontradicted evidence suggesting that Giant 1 is worth greatly in excess of the US$1 paid for it to Verber.

76. Having evaluated the evidence before me I conclude that there was a breach of the Order, as HHJ Mackie QC found. His judgment, which was extempore, is not 100% clear, but what he found was this:

> "Documents obtained by the investigators retained by the claimant indicate that there is a public deed of 12 October 2011, issued by the Ninth Circuit Panama in the Republic of Panama and a sale agreement and purchase acceptance by which Verber sells the yacht to Phoenixrise SA. There is a letter of consent to change of owner from the mortgagees who appear to have $19.8 million outstanding upon the vessel....
>
> …there is intelligence that the yacht is valued at €12 million and requires €15 to €20 million of restoration depending on the finish, and presumably the taste of the person acquiring it....'
>
> There is some evidence that Mr Khoroshilov has sought in the past to suggest the yacht is valueless, notwithstanding the fact it was originally purchased in 2006 for over $31 million.
>
> ....The position, as I see it, is this. First, it is clear beyond all doubt that the yacht was a defined asset and that Mr Khoroshilov accepted that it was. Secondly, it is clear beyond doubt that there was a transfer in 2011 of the yacht from the company which held it to another one for a nominal consideration. It follows that there has been a breach of the order."

77. This appears to me to accurately but not quite fully reflect the evidence which was (and is) this:

i) Mr Khoroshilov identified Giant 1 as an asset of his in his asset disclosure affidavit;

ii) He mentioned the mortgage of US$19.8 million. He also gave it as his view that in the wake of the fire the asset was valueless, estimating the cost of repair as US$19 million;

iii) However in his further disclosure he disclosed evidence that:

a) An acceleration notice had been served after the fire on the yacht. At that time the outstanding mortgage was US$16.387 million;

b) €7.5 million had been paid out by insurers to repair the yacht;

c) That sum had been applied to reducing the indebtedness under the mortgage;

d) The remaining sum due under the mortgage was at that time some US$4.206 million.

iv) To meet the suggestion that the asset was valueless the Bank adduced evidence on the committal application. That evidence noted the original value of the yacht as US$31 million and indicated a value even after the fire of €12 million with a value after a €15-20 million repair/refit of €32 million;

v) The letter of consent to which HHJ Mackie QC referred is couched in terms which suggests that the original sum of the mortgage was US$19.8 million and says nothing about the sum outstanding on the mortgage at the time of sale.

78. In other words, the reference in the judgment to a mortgage of US$19.8 million is a red herring. At the time of the sale, by Mr Khoroshilov's own account, the mortgage was US$4.2 million. With an estimated unrepaired value of €12 million that would indicate a value of at least a few million dollars. Added to that may be said to be a contingent value based on the uplift in value once repaired. That being the case, the yacht was not valueless and the sale of it was a breach of the Order, as HHJ Mackie QC found.

79. There is therefore no reasonable prospect of success in overturning the conclusion that Mr Khoroshilov was in contempt of court. Nor, given the facts, can it be said that a consideration of committal for contempt was disproportionate.

80. As for the question of the sentence, that is not within the ambit of the application. The application is "*to set aside the Order of HHJ Mackie QC of 1 October 2013"*. That Order deals only with the finding of contempt. Any challenge to the sentence would be a challenge to an entirely separate Order, that of Cooke J of December 2013.

81. And while I have not heard full argument on the point - which was a point deployed very late in the day - I would doubt whether, even aside from the considerations of lateness and absence of good reason considered above, such an argument could have any prospect of success.

82. In the first place there is authority for an approach very much in line with that taken by Cooke J. In *JSC BTA Bank v Solodchenko (No 2)* [2012] 1 WLR 350, at [51], Jackson LJ stated, following a thorough review of the authorities:

> "What [the cases] show collectively is that any deliberate and substantial breach of the restraint provisions or the disclosure provisions of a freezing order is a serious matter. Such a breach normally attracts an immediate custodial sentence which is measured in months rather than weeks and may well exceed a year".

83. Secondly in the context of criminal sentencing appeals (which is obviously a pertinent comparison given the quasi-criminal nature of contempt and the penalty imposed) the time limits in place effectively preclude appeals on the basis that that a sentence can be said to be wrong by reference to subsequent guidelines. Thus even if the sentence were a little higher than the Court would give today, it is unlikely that it would be overturned.

84. For the reasons given above I conclude without hesitation that the Second Application should be dismissed and the Order of HHJ Mackie QC stands.

The Service Order

85. In many ways the main focus of the submissions for Mr Khoroshilov was on the First Application, as to alternative service.

86. The Bank took this point lightly, submitting that if Mr Khoroshilov cannot succeed in setting aside the Committal Order, there is little point in having an argument about whether the alternative service order was properly made.

87. That may not be technically correct. But in any event I have concluded that the challenge to this order also fails.

88. The argument for Mr Khoroshilov hinged on two points. The first was a submission as to the seriousness of a committal application, given its potential implications for personal liberty. Dr Van Dellen reminded me of the backdrop of the rules, in particular CPR r.81.10(4) and (5):

> "(4) Subject to paragraph (5), the application notice and the evidence in support must be served personally on the respondent.
>
> (5) The court may –

> (a) dispense with service under paragraph (4) if it considers it just to do so; or
>
> (b) make an order in respect of service by an alternative method or at an alternative place."

89. It was then at least tacitly the submission that because of the seriousness of committal applications the test of exceptionality applicable to dispensing with service was appropriate. He therefore cited *Masri v Consolidated Contractors International Co SAL* [2010] EWHC 2458 which makes clear at [40], the power to dispense *"should not be exercised too readily, lest what should be a dispensing power for use in exceptional cases may gradually undermine the express requirements of the rule".*

90. That approach also underpinned reliance on *Lonestar Communications Corp LLC v Kaye* [2019] EWHC 3008 (Comm) to find a submission that proof of an attempt to serve via the Hague Convention was a necessary pre-requisite to a finding of exceptionality, and that this could not be satisfied here.

91. Reliance was also placed on *Punjab National Bank (International) Ltd v Srinivasan* [2019] EWHC 89 (Ch) at [96-100], and *Marashen Ltd v Kenvett Ltd* [2017] EWHC 1706 (Ch), [2018] 1 WLR 288 in support of the argument that permission to permit service by alternative means in a Hague Convention case should only be permitted where there was a good reason based on exceptional circumstances, and that a "good reason" alone set the bar far too low.

92. The back-up argument was that if the Court determined that it was exceptionally dispensing with personal service and ordering service by an alternative method under CPR r.81.10(5)(b), alternative service under the Hague Convention should then have been ordered.

93. I consider that these submissions are founded on two slight misunderstandings of the law in this area. First, there is no basis in the authorities for the proposition that alternative service in the context of committal requires the application of any test other than that which is applicable to alternative service generally. Of course, any decision is fact sensitive and the fact that the application is being made in the context of a committal application will inevitably weigh with a judge considering such an application.

94. Secondly it is overly simplistic to say that the test for alternative service in the context of the Hague Convention is exceptionality and thus the authorities relevant to dispensing with service are relevant. Dispensing with service and ordering alternative service are two very different concepts. A court dispensing with service may well be confronting head on the real possibility that the documents in

question may not come to the attention of the intended recipient. When ordering alternative service the Court orders service on people or locations which it considers offer a good or the best chance of ensuring that proceedings do come to the intended recipient's attention.

95. That significant difference is reflected in the different tests which apply under the CPR. Dispensing with service under CPR 6.16 requires *"exceptional circumstances"*, whereas alternative service is possible *"where it appears to the court that there is a good reason"*.

96. There is of course then the complication of the Hague Convention, which has led to the fertile debate in the authorities as to whether the test in such cases is one of exceptionality, special circumstances, or simply "good reason". That is a debate which can be traced through such authorities as *Cecil v Bayat* [2011] 1 WLR 3086, *Bill Kenwright v Flash Entertainment* [2016] EWHC 1951, *Société Générale v Goldas* [2017] EWHC 667 (Comm), *Marashen v Kenvett* [2018] 1 WLR 288, 37-59, *Flota Petrolera Ecuatoriana v Petroleos de Venezuala S.A* [2017] EWHC 3630 (Comm) at 20-31, *Team Y & R Holdings Hong Kong Ltd v Cavendish Square Holding BV* [2017] EWHC Crim 2401 (Comm) 135-140 and *Kozar v Mostafa Akcil* [2018] EWHC 384 (Ch) 32-48.

97. However a landing place was reached (at least for now) in *Goldas* in the Court of Appeal which found at [33] that *"service by an alternative method [in a Hague Convention Case] is to be permitted "in special circumstances only."* The test of CPR 6.15 remains (as it must, unless there is a change in the CPR) "good reason", but where the Hague Convention is a factor there will only be good reason if there are special circumstances. That there is a distinction between the test under CPR 6.16 and under CPR 6.15 with a Hague aspect is clear from the judgment of the Court of Appeal in *Bank St Petersburg v Arkhangelsky* [2014] EWCA Civ 593 [26].

98. I do consider that there were special circumstances in this case. This case is a country mile from the kind of case where alternative service is sought simply on the grounds of delay in effective Hague Convention service. The evidence shows that the Bank had good – evidence based – reasons for supposing that service via the Hague Convention on the addresses they had previously been given by Mr Khoroshilov would not be effective.

99. That is acknowledged on the authorities to be an important factor, as noted in *Goldas* at first instance: *"There will be a focus on whether the claimant could have effected proper service …, and if so why he did not, although this is by no means the only area of inquiry: Abela at [48], Kaki at [33], Barton at [19(iv)]"*.

100. I reject the submission that service via the Hague Convention (supported by a Russian Court summons) might have flushed out an

answer where ordinary attempts to serve had not – the evidence was that communications from the Russian Courts had gone unanswered, and that the best efforts of the Russian law enforcement agencies had failed to locate Mr Khoroshilov. Further the arrest warrant would mean that obeying a summons would expose him to the risk of being arrested. These are plainly unusual and special circumstances.

101. Further:

    i) This was a case where the Court had every reason to think that alternative service would bring the application to the recipient's attention better than normal service – this is because FFW were still on the record and would have a duty to bring the documents to the attention of their client.

    ii) It is clear that careful consideration was given to the question of alternative service, and the issue of addresses, with the application being adjourned for further evidence.

102. As for the suggestion that alternative service should have been via the Hague Convention, I find no basis for this in the authorities, and it is hard to see how that could have been done given that Mrs Khoroshilova was not the addressee of the proceedings and FFW were in this jurisdiction.

103. Thus even if this application were not, in view of the conclusions which I have reached on the Second Application, somewhat academic, I have no difficulty in concluding that there is no basis for the Order to be set aside. The First Application is likewise dismissed.